

Energy, Utilities, Telecommunications & Transportation Law

The newsletter of the Illinois State Bar Association's Section on Energy, Utilities, Telecommunications & Transportation Law

Illinois Establishes Solar & Wind Siting Standards; Counties on Short Timeframe to Comply

BY ADAM MARGOLIN, KATE DUNCAN, CHRIS SKEY, & ELIZABETH MCERLEAN

The Illinois General Assembly recently enacted legislation,¹ which the Illinois governor signed into law, that addresses county-level regulation over the siting and zoning of larger solar and wind projects.

Among other things, the bill:

- Prohibits counties from enacting local ordinances that disallow commercial solar and wind

Continued on next page

Getting Railroads Back on Track: Bi-Partisan Legislation Aims to Impose Rail Safety Measures After Slew of Hazmat Derailments

BY STEPHANIE A. BLACK

Following the February 3, 2023, derailment of a Norfolk Southern train in East Palestine, Ohio, in which 11 hazmat-tank cars released vinyl chloride, ethyl acrylate and isobutylene into the

community, the rail industry was, again, thrust into the spotlight. The Ohio tragedy has amplified scrutiny on railroads and their operations and comes on the heels

Continued on page 3

Illinois Establishes Solar & Wind Siting Standards; Counties on Short Timeframe to Comply
1

Getting Railroads Back on Track: Bi-Partisan Legislation Aims to Impose Rail Safety Measures After Slew of Hazmat Derailments
1

Update on the ISBA's Diversity, Equity, Inclusion, and Accessibility Initiatives Regarding Disability and Disabled People
5

Illinois Establishes Solar & Wind Siting Standards; Counties on Short Timeframe to Comply

CONTINUED FROM PAGE 1

generating facilities in select zoned districts;

- Recognizes county authority over certain siting and zoning standards, while restricting many county-level standards that effectively prohibit development of such facilities; and
- Prescribes certain procedural processes and timelines associated with the siting and zoning reviews of these facilities and prohibits the assessment of unreasonable county fees associated with the siting and zoning process.

Key Points in the Bill

The legislation applies to commercial solar and wind facilities. Covered solar facilities are generally defined as ground-mounted systems that generate power for the primary purpose of wholesale or retail sale and not primarily for on-site consumption. Covered wind facilities are those equal to or greater than 500 kilowatts in total nameplate generating capacity. Notably, there are exceptions for certain defined categories of solar facilities that are located on or adjacent to former coal mines; the legislation does not restrict counties in their siting and zoning authority for those facilities.

The bill seeks to prohibit counties from enacting local ordinances that contain an outright ban on solar and wind projects on land zoned for agricultural or industrial use. Specifically, the legislation states that a county may not adopt zoning regulations that disallow, permanently or temporarily, solar and wind facilities from being developed or operated in any district so zoned.

The legislation provides that a county may establish standards for commercial solar and wind facilities but may not set standards that are more restrictive than those contained in the bill itself. If a county has an existing ordinance that conflicts with the bill (*i.e., it contains more stringent standards*), the county has until May 27, 2023, to amend its ordinance in a manner consistent with the bill.

In addition to broad language restricting county level regulation of the siting and permitting process, the bill contains a laundry list of specific rules about facility siting and design components. Those provisions provide specific guidelines for setbacks relating to surrounding property, including participating and non-participating properties, public roads, residential and non-residential buildings, existing utility equipment and lines, and protected lands. For a solar project, for example, the minimum setback distance must be 50 feet from the nearest point on the property line of a non-participating property to the nearest edge of any component of the solar facility.

Other Permissive and Restrictive Provisions of the Bill

- A county must provide siting approval or a special use permit where the request complies with the requirements contained in the bill, the county-adopted zoning ordinance, and any conditions imposed under State and federal statutes and regulations.
- A county may not enact siting rules for “supporting facilities” that preclude development of the associated commercial solar or wind facilities themselves.
- A county may not assess unreasonable permit application fees, and the county-imposed fees for a given solar or wind project must be consistent with the fees for other projects in such county with similar capital value and cost.
- A county may not require standards for construction, decommissioning, or deconstruction of a covered solar or wind facility or related financial assurances that are more restrictive than those included in the Illinois Department of Agriculture’s standard solar agricultural impact mitigation agreement or wind farm agricultural impact mitigation agreement,

Energy, Utilities, Telecommunications & Transportation Law

This is the newsletter of the ISBA’s Section on Energy, Utilities, Telecommunications & Transportation Law newsletters are free to section members and published at least four times per year. Section membership dues are \$30 per year.

To subscribe, visit www.isba.org/sections or call 217-525-1760.

OFFICE

ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS

Harry L. Dubnick
Alan J. Jedlicka

PUBLICATIONS MANAGER

Sara Anderson

✉ sanderson@isba.org

ENERGY, UTILITIES, TELECOMMUNICATIONS & TRANSPORTATION SECTION COUNCIL

Christine G. Zeman, Springfield, Chair
Eric Bramlet, Vice-Chair
Alan J. Jedlicka, Secretary/Newsletter Co-Editor
Charles Y. Davis, Ex-Officio
John D. Albers
Stephanie Ann Black
Gerardo Julian Delgado
Harry L. Dubnick, Newsletter Co-Editor
Freddi L. Greenberg
Guy C. Hall
Laurie A. Harmon, CLE Coordinator
Leon Huddleston
Daniel A. LaKemper
Adam T. Margolin
Mallory P. Sanzeri
Ellen J. Schanzle-Haskins
Craig J. Sondgeroth
Andrew G. White
Diana Christine Servos, Board Liaison
Kimberly A. Furr, Staff Liaison

DISCLAIMER: This newsletter is for subscribers’ personal use only; redistribution is prohibited. Copyright Illinois State Bar Association. Statements or expressions of opinion appearing herein are those of the authors and not necessarily those of the Association or Editors, and likewise the publication of any advertisement is not to be construed as an endorsement of the product or service offered unless it is specifically stated in the ad that there is such approval or endorsement.

Articles are prepared as an educational service to members of ISBA. They should not be relied upon as a substitute for individual legal research.

The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

as applicable, and in effect on December 31, 2022.

- A county may not condition approval of a covered solar or wind facility on a property value guarantee and may not require a facility owner to pay into a neighboring property devaluation escrow account.
- A county may require that no component of a solar project's solar panels have a height of more than 20 feet above ground when the arrays are at full tilt, unless each affected non-participating property owner waives such restriction.
- A county may require certain vegetative screening surrounding a solar or wind facility but may not require earthen berms or similar structures.
- A county may not enact sound restrictions for solar facility components or wind towers that are more restrictive than existing Illinois Pollution Control Board standards.
- A county may require a covered

facility to (i) plant, establish, and maintain vegetative ground cover for the life of the facility, consistent with the goals of the Pollinator-Friendly Solar Site Act, and (ii) prepare and submit a vegetation management plan.

- A county may require a developer to provide the county with various reviews performed under Illinois Department of Natural Resources, U.S. Fish and Wildlife Service, and Illinois State Historic Preservation Office requirements, and to comply with certain recommendations contained in such reviews.

In addition, the bill imposes road preparation, improvement, repair, and maintenance obligations on developers of covered solar and wind facilities. The bill also allows solar facilities to cross or impact certain drainage systems without obtaining prior agreement from the drainage district so long as all damage to the drainage system is repaired.

Trailer Bills

This legislation is likely not the final word on county siting and zoning of solar and wind projects in Illinois. New so-called "trailer bills" have already been introduced that relax or otherwise modify the legislation's requirements and prohibitions.

For more information on how this solar and wind siting legislation may benefit or affect your business, contact:

- Adam Margolin: (312) 715-5089 / adam.margolin@quarles.com
- Kate Duncan: (312) 715-5113 / kate.duncan@quarles.com
- Chris Skey: (312) 715-5023 / chris.skey@quarles.com
- Elizabeth McErlean: (312) 715-5222 / elizabeth.mcerlean@quarles.com ■

1. Public Act 102-1123; <https://www.ilga.gov/legislation/publicacts/102/PDF/102-1123.pdf>.

Getting Railroads Back on Track: Bi-Partisan Legislation Aims to Impose Rail Safety Measures After Slew of Hazmat Derailments

CONTINUED FROM PAGE 1

of a standoff with employees over strict availability policies requiring congressional action to prevent a national strike last December. A string of derailments occurring across the country since East Palestine, involving many of the country's largest railroads such as BNSF,¹ Union Pacific,² Canadian Pacific,³ and Norfolk Southern,⁴ have ignited calls for greater oversight and restrictions for rail carriers.

Uniting a notoriously divided Congress, bi-partisan support mounts for the 2023 Railway Safety Act, expected to advance to the senate floor in April.⁵ Senators Dick Durbin and Tammy Duckworth have expressed support for the legislation. While the bill proposes significant rail safety measures, Illinois residents and leaders remain concerned with the potential for large-scale disaster in Illinois. Although the East Palestine derailment occurred in Ohio, the train originated close to home in

Madison, Illinois.

Potential for Hazmat Disaster in Illinois, Center of Nation's Rail Network

Chicago boasts the country's largest rail hub, with Illinois itself serving as a major rail center, containing 7,400 miles of track and the only state operating all seven Class I railroads. As key interchange points, the Chicago and St. Louis switching districts connect eastern, western, northern, and southern rail travel, handling over 35,000 rail cars on a typical weekday.⁶

Given the state's rail volume, Illinois unsurprisingly possesses an extensive network of hazardous materials shippers, with the largest number sitting in Cook County (39), followed by Will County (21), and St. Clair (16) and Madison (10) counties, among others. In 2020 alone, approximately 9.95 million tons of hazardous materials (or

299,910 carloads) originated from Illinois hazmat shippers.⁷ These figures, combined with fallout due to failures leading to the East Palestine disaster, have sparked concern over railroad operations and maintenance procedures given the prevalence of hazardous materials being transported – and repeatedly released due to derailment or other malfunctions – every year in Illinois.

According to data provided by the Illinois Commerce Commission (ICC), from 2013-2022, there were 37 derailments involving hazardous materials release, while a staggering 584 incidents involved hazmat release absent derailment. In the same 10-year period, an additional 195 derailments occurred where hazardous materials were fortunately contained. The most common substance involved is diesel, which is alone capable of wreaking havoc on Illinois' ecosystem, often contaminating land, air, or water. For example, in 2015, a BNSF freight

train derailed in Galena, Illinois, spilling roughly 218,000 gallons of crude oil near the Mississippi and Galena rivers.⁸ In 2020, sulfuric acid was released due to derailments twice, the first involving a Canadian Pacific train and another occurring on Christmas Eve in Dixon, Illinois, when a Union Pacific train derailed, causing a tank car to release 197,700 pounds of sulfuric acid. And in May 2021, a Norfolk Southern train, which included tank cars with spent sulfuric acid from nearby Phillips 66 refinery, was sitting on the tracks in Wood River, Illinois, when a tank car's pressure relief disk failed, allowing sulfuric acid to spew into the community.

While a derailment does not necessarily produce a significant environmental impact or personal injury, the nature of derailments and how they occur, particularly when hazardous and combustible materials are involved, dramatically increases the risk of catastrophe from a single event. Derailments involving hazardous materials are especially worrying given the extreme length and tonnage of trains that transportation employees are required to operate.

Norfolk Southern employees familiar with the East Palestine derailment were critical of the length and weight of the train, topping out at 9,300 feet and 18,000 tons with 2 forward-facing locomotives and 149 cars, believing both to be contributing factors leading to the derailment and subsequent contamination. The employees, unnamed due to fear of retaliation from the railroad giant, also claim the train broke down at least once between leaving Madison on February 1 and the February 3 derailment.⁹ Most critics point to Precision Scheduled Railroad (PSR) as the culprit for increased hazmat derailments, claiming it has led to railroads emphasizing profits over safety.

The Perils of Precision Scheduled Railroading

Nearly all Class I railroads have employed PSR, with Norfolk Southern formally adopting the model in 2019. PSR proponents, including the Association of American Railroad (AAR), an industry group representing the major freight railroads, claim it streamlines operations and provides more consistent and reliable service. Others, including rail workers and

unions representing maintenance crafts and train crews, are skeptical of PSR given its cost-cutting emphasis, which includes massive cuts in employee headcount. Many employees link PSR's workforce reduction with the carriers' push for one-person crews. Workers claim that the railroads are using their stringent availability policies to terminate employees to both cut costs and manufacture a worker shortage necessitating one-person train crews. The Class I railroads and the AAR have been vocal in supporting one-person crews in recent years, with Union Pacific recently announcing a pilot program utilizing "ground-based" conductors with only engineers physically in the train.

While several states, including Illinois, have enacted legislation prohibiting one-person crews and requiring at least one certified engineer and one certified conductor, the Railway Safety Act would require two-person crews, with limited exceptions. Despite initially doubling down after East Palestine, and amid growing support for the legislation, both Norfolk Southern and Union Pacific have recently announced a reversal in their previous support of one-person crews.¹⁰

PSR critics point to provisions of the bill that seemingly counter the concept, including limits on train length and weight, train consist,¹¹ track standards, and track, bridge and rail car maintenance, along with more stringent inspection requirements for locomotives and cars. A December 2022 report by the Government Accountability Office indicates that PSR has led to longer trains, along with 28% reduction in workforce.¹² While railroads point to increasing cars on a train as way of improving efficiency, longer trains mean more physical and mental wear and tear on train crews that must regularly walk the length of the train to perform trackside duties in addition to having to operate the freight over varied terrain. Considering through-freight train crews often work 12-hour shifts,¹³ the added length increases exposure to injury and exhaustion. And, longer trains means more cars in the consist and an increased chance of those cars containing hazardous materials. With that in mind, the legislation also requires increased

transparency regarding the hazardous materials being transported so that local authorities are better prepared should an emergency occur.

The workforce reduction spurred by PSR has led to dramatic cuts in maintenance of way crews (who inspect, repair and maintain track), leading to defective track conditions that can, and often do, lead to derailments. Mechanical department employees (who inspect, repair and maintain locomotives and cars) face concerns due to PSR's emphasis on performance metrics and reducing shop dwell time (the amount of time a locomotive or car is physically shopped and unable to be used by transportation), versus thoroughly troubleshooting and adequately repairing defects. The bill's heightened requirements regarding hazmat tank car inspection and maintenance may prove especially beneficial for Illinois residents and crews operating trains within the state, given that hazardous materials are released due to issues with cars themselves 58 times on average per year in Illinois.

Railroad Resistance to Change

In the wake of East Palestine and demands for change, Norfolk Southern's CEO Alan Shaw has since voiced support for some safety enhancements proposed by the legislation, such as phasing out older tank car models and training for emergency responders but has stopped short of endorsing several key parts of the bill.

The East Palestine tragedy has sparked a generally united response among oft at-odds Republicans and Democrats, all seeking to prevent future similar disasters in their home states. Railroads, on the other hand, are unlikely to endorse the Rail Safety Act due to the impact on their bottom line. The bill's focus on shortening trains and protecting two-person crews while enhancing inspections, maintenance and repair of track, locomotives and cars will undoubtedly lead to a kink in the PSR machinations instituted by the major freight railroads over the years.

Still, it is not all spilled milk for the railroads, given that the Class I railroads generated \$90.8 billion in operating revenue in 2022, with each netting billions in profit: Union Pacific - \$6.998 billion; BNSF - \$5.946 billion; Norfolk Southern - \$4.8 billion; CSX

- \$4.17 billion; Canadian National - \$3.937 billion; Canadian Pacific - \$2.705 billion; and Kansas City Southern - \$1.073 billion. Investing in enhanced rail safety appears feasible with profit margins like these. But, whether such change from carriers comes about by choice or force is yet to be seen. ■

Stephanie A. Black is an attorney at Groves Powers, LLC, in St. Louis, Missouri.

1. <https://www.usatoday.com/story/news/nation/2023/03/09/train-derailments-alabama-ohio-west-virginia/11435462002/>
2. <https://www.sierradailynews.com/national-news/train-carrying-iron-ore-derails-in-san-bernardino-county-california/>
3. <https://www.washingtonpost.com/transportation/2023/03/27/north-dakota-california-train-derailments/>
4. <https://www.npr.org/2023/03/06/1161262824/train-derailment-springfield-ohio>
5. <https://apnews.com/article/ohio-train-derailment-congress-6288cdfb0b4381de4c9bf05199b8ba6>
6. <https://www.icc.illinois.gov/downloads/public/rr/2022%20Hazardous%20Materials%20Report.pdf>
7. *Id.*
8. https://19january2017snapshot.epa.gov/il/galena-train-derailment_.html
9. <https://www.cbsnews.com/news/ohio-train-derailment-east-palestine-norfolk-southern-excess-size/>
10. [https://abcnews.go.com/Business/wireStory/railroad-](https://abcnews.go.com/Business/wireStory/railroad-drop-push-person-crews-98137976)

[drop-push-person-crews-98137976](https://abcnews.go.com/Business/wireStory/railroad-drop-push-person-crews-98137976).

11. A consist is the group of rail vehicles making up a train.
12. <https://www.gao.gov/assets/gao-23-105420.pdf>.
13. Transportation crews are governed by the hours of service laws (HOSL), which mandates that crews cannot work longer than a 12-hour shift.

Update on the ISBA's Diversity, Equity, Inclusion, and Accessibility Initiatives Regarding Disability and Disabled People

BY PATTI CHANG

The Illinois State Bar Association (ISBA) strives to increase diversity, equity, inclusion, and accessibility (DEIA) in many ways and is making DEIA a top priority going forward. This article provides an update on the ISBA's DEIA initiatives with respect to disability and disabled people. But before moving on, a quick note regarding the verbiage used in this article is in order. We use identity first language intentionally because the author of this article prefers it, while at the same time, we acknowledge that not all people with disabilities have the same preference. So, we speak in terms of "disabled people" as opposed to "a person who is disabled."

We at the ISBA also believe that efforts around DEIA are helpful to all. Take curb cuts as an example; though originally developed to increase accessibility for people using wheelchairs, they are also helpful to those pushing baby strollers or pulling rolling suitcases too. Scanners and optical character recognition are also widely used technologies that were originally invented to aid the blind in reading printed materials which could then be translated from text to speech. The key takeaway here is that making changes to our world to make it more

accessible to disabled people yields dividends for everyone.

The ISBA's Disability Law Committee

There is an axiom in the disability community—"nothing about us without us." As the ISBA is no exception, our DEIA efforts around disability begin with our Disability Law Committee. The Committee's charges include promoting fair and equal treatment of disabled people and providing a forum for education and advocacy as it relates to disabled people generally; as well as to further the professional development and inclusion of attorneys and law students with disabilities, and practitioners who serve disabled clients, by creating programming and other resources to support their professional needs. Additionally, the Disability Law Committee actively supports inclusivity within the ISBA through outreach to various stakeholders in the legal community.

The Committee also brings accessibility barriers to the attention of ISBA leadership and staff. For example, the Committee presses the ISBA to commit to using only

accessible event venues that are welcoming to people using wheelchairs (see more on this below). The Committee also points out issues within the ISBA's web presence that would be inaccessible to blind people using screen reader software.

Another important role of the Committee is to provide perspective and feedback about problematic language to ISBA staff. A good example was when the Committee was helping to shape the ISBA Accessibility Statement, which originally stated that we "encourage the visually impaired to bring along an additional individual [to events] at no additional charge to take notes or assist." This suggestion, though well-intentioned, sounds custodial and has since been replaced by simply asking members if there are reasonable accommodations that would allow them to participate more fully.

More recently, the Committee has begun to engage with ISBA staff through regular meetings on DEIA within the Association. Meetings take place every couple of months and create an ongoing dialogue which is helpful in keeping the idea that disability is part of diversity at the forefront.

This journey has not always been smooth,

but for the most part it has been moving forward and has led to positive change. The ISBA has come a long way from the author's first Midyear Meeting where she was unfortunately asked, "honey this is a meeting for lawyers. Where are you trying to go?"

Working Together in Many Areas

Through our regular meetings with ISBA staff, we are now sharing ideas and solutions. Because every disability is different and every disabled person is unique, DEIA around disability is especially complex. That said, we have been working on some key areas that I will touch upon below.

Meeting and Event Venues, Location, and Accessibility

The accessibility-related challenges inherent in meeting and event venues is best exemplified by considering the Abbey Resort in Wisconsin, where the ISBA Annual Meeting has been held many times in the past. Most attendees would attest that this venue is an accessibility nightmare with several different levels that are not easily accessed via elevators. While the ISBA did continue to return to the Abbey after accessibility barriers were pointed out by the Disability Law Committee, staff has assured us that it will no longer be a future venue for the ISBA.

As the above demonstrates, meeting venues typically pose significant challenges in relation to accessibility. Not only do we want facilities that can be easily maneuvered by all, but we also need venues that are accessible via public transit. Not everyone drives a car, and not everyone can afford to drive a car to a venue. When selecting venues, we should be asking whether the venue has proper signage and if it is friendly to those with mental health issues. Accessibility-related issues should be top of mind when venues are sought out for ISBA meetings and events.

One way to be inclusive for disabled members and guests is to make clear that reasonable accommodations are possible and clearly state where such requests should be directed. This has been included in the ISBA Accessibility Statement, but the committee urges the ISBA to include a similar statement on all communications about virtual and in-person events that informs

potential participants about the reasonable accommodation process.

Continuing Legal Education

The ISBA is thankfully encouraging CLE planners to seek out diverse speakers including disabled people. If lawyers do not see their disabled colleagues as experts in their own right, they will be less likely to have high expectations for disabled people, which impacts everything from socialization to hiring decisions. Moreover, CLE materials that are distributed to attendees should be readable by all. As such, speakers are discouraged from simply handing in scans of their materials that are images, and are encouraged to submit materials in text-based formats like Word, RTF, and text-based PDFs that allow blind people using screen readers to access those materials easily. By the way, text-based materials are searchable by all, which is a great example of how accessibility benefits everyone.

ISBA Website

The ISBA has worked hard to improve our accessibility on the web. Our accessibility statement page says it well in listing the following measures being taken to improve accessibility:

- Regular review of design and coding of website for accessibility improvements;
- Providing accessibility training for ISBA staff;
- Integrating accessibility into our procurement practices;
- Automated closed captioning available for all On-Demand CLE programs created after September 2021;
- All live CLE webcasts now offer closed captioning and transcripts via Zoom; and
- Reviewing PDFs, Word documents, and other files to prioritize documents to make accessible and to develop accessible templates for future documents.

One recent improvement the ISBA can be especially proud of is providing its judicial evaluations on the web in a more accessible format than the PDFs that had been previously used. Those statewide evaluations are available to the public and are

used by almost a hundred thousand people in the November 2022 election. One grateful voter said "This is the first time I have found enough accessible information on the web in Illinois to make informed decisions in judicial races. I used to just not vote for them at all." This change also made the judicial evaluations mobile friendly and more user friendly generally, as another example of how making something accessible benefits everyone.

Future Efforts

Is there more to do? Of course, there is more to do. Twenty to twenty-five percent of the population has a disability, yet the ISBA membership includes few disabled people and is lacking disabled people in leadership positions. ISBA staff members with disabilities are also few. Sometimes it seems that our DEIA efforts leave out those with disabilities entirely, and staff and members likely exhibit hidden, implicit biases that unintentionally exclude people.

So, the ISBA should work on future DEIA initiatives, which might include:

- Actively recruiting law students, lawyers, and employees with disabilities and creating a pipeline to leadership through networking and mentorship;
- Hiring someone on ISBA staff who has expertise in diversity, equity, inclusion, and accessibility;
- Adopting a robust plan to ensure accessibility of future venues; and
- Providing more helpful information around the law in accessible formats to the general public.

If you want to help with these efforts or know someone we should recruit to help with these initiatives and others, please reach out to the author (PCchang@nfb.org) and she'll relay the information to our Disability Law Committee. ■